

Workmen's Compensation Act: Liability of Co-employees. Third Parties

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Repository Citation

Eugene H. Christman, *Workmen's Compensation Act: Liability of Co-employees. Third Parties*, 14 Marq. L. Rev. 239 (1930).
Available at: <http://scholarship.law.marquette.edu/mulr/vol14/iss4/11>

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such a finding would have to be sustained in every case where a landlord had grounds which would support a suspicion that his tenant might engage in an illegal enterprise on the premises. A landlord cannot be obliged to act on the supposition that every restaurant or refreshment parlor is engaged in the illegal sale of intoxicating liquors as a matter of fact. In the case of *Harbison v. Shirley*, 139 Iowa 605, 117 N.W. 963, 19 L.R.A. (N.S.) 662, it is held that a mere suspicion by the landlord that there is or may be an offence committed is not sufficient to defeat his right. There must be some form of connivance, however slight, to render a contract void. Mere indifference as to the intended use is not enough; his relation to the unlawful purposes must be active in some degree, and until such connivance is shown, the lessee will be held to the contract *Tracy v. Tolmadge*, 14 N.Y. 162; *Chamberlain v. Fischer*, 117 Mich. 428; *Anheuser-Busch Brewing Co. v. Mason*, 44 Minn. 318; 9 L.R.A. 506; 46 N.W. 558.

Jakopichuk, prior to entering into the real estate business in 1922, had been a saloon keeper and had been convicted of a violation of the prohibition law; he had intervened in the transaction in order to procure the lease from the plaintiff in the first instance, and quite clearly took advantage of the situation so as to compel his sub-lessees to pay a large amount for continued possession of the premises which he no doubt contemplated that they would do because of the illicit business which they might transact upon the premises. Clearly there is no other way in which the large amount they were compelled to pay him above the normal rental could be accounted for. The plaintiff did not in any way participate in the transaction except to agree that the sub-lessees might pay the rent directly to them.

The judgement in each case denying the plaintiff's right to recover is reversed and the cause remanded to the trial court with directions to enter judgment against defendant Jakopichuk for the amount due under the leases. The judgment dismissing the cross complaint of defendant Jakopichuk is affirmed.

CHARLES L. LARSON

Workmen's Compensation Act: Liability of Co-employees.

Third Parties—Plaintiff accepted compensation under Workmen's Compensation Act for the death of her husband, which was occasioned by a co-employee's negligence, and after being assigned the employer's rights, sued the tortfeasor.— *Held*: The acceptance of the award was no bar to the action. *McGonigle v. Gryphan, Wis.*, 229 N.W. 83.

The defendant is liable unless the relation of fellow workman or a provision of the act exempts him. 18 R.C.L. 540. By the weight of

authority an employee is liable for negligence causing injury to a fellow workman. *Hinds v. Overacker*, 66 Ind. 547, 32 Am. Rep. 114; *Hare v. McIntire*, 82 Me. 240, 19 Atl. 453, 17 A.S.R. 476, 8 L.R.A. 450; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437. Similarly held in the Wisconsin case of *Lawton v. Waite*, 103 Wis. 244, 79 N.W. 321: "If one by his negligence injures another, it is no defense in a suit against him to assert they are both employed by one master."

A minority of courts exempts the co-employee in an action where the negligence complained of is mere non-feasance or neglect of duty. *Jewel v. Kansas City Bolt Co.*, 231 Mo. 176, 132 S.W. 703, 140 A.S.R. 515 where "a foreman in a mill is not liable in damages for personal injuries sustained by a servant of master in consequence of foreman's non-feasance or mere neglect of duty, but is liable jointly with master for positive wrong or misfeasance." The facts of the instant case do not present a similar situation as above mentioned, and it clearly is not at variance with the rule contained therein.

Under Section 102.29 of Wisconsin Statutes, this action is maintainable for purposes of exonerating the employer, and to further compensate the beneficiary. *Cermak v. Air Power Pump Co.*, 192 Wis. 44. Recovery by beneficiary was permitted against a third person, other than employer, after acceptance of an award under this act, and assignment of the insurer's cause of action. To this three justices dissented, based on a construction of Section 102.06, referring to relation of employer and independent contractor. The plaintiff was employed by an independent contractor employed by defendant to erect a building. The sub-contractor paid the compensation. In dissenting to holding the Pump Company a third person, Justice Rosenberry said: "There exists no doubt in my mind that the Workman's Compensation Act preserves to the injured workman, and in the case of an award to him under the act for the benefit of his employer, such cause of action may exist at common law against a third person." But he added, "The Pump Co. is rightly the employer." That argument is not applicable to the case under discussion. The majority opinion as stated has been affirmed by decisions in many other jurisdictions. 247 Ill. app. 352, No. 354 3d. A. Dig. Sys. Evidence of compensation held inadmissible in action against third person whose negligence caused injury. And in *Arnold v. Ohio Gas and Electric Co.*, 162 N.E. 765, 28 Ohio app. 434, a similar action was maintainable after acceptance of an award; *Galveston H. & S. A. Ry. Co. v. Mallot*, 6 S.W. (2d) 432. The injured party may, at request of indemnifying party, sue third persons.

A few courts deny the employee the right of action against tortfeasors. *Roecklein v. Am. Sugar Refining Co.*, 226 N.Y.S. 375; *Tandsetter v. Oscarson*, N. Dak., 217 N.W. 660. The acts of these states

provide assignment of the beneficiary's cause of action to the insurer, but in the *Cermak Case* and likewise the *McGonigle Case*, supra, the actions according to statute were reassigned.

But the defendant contends a third party does not include a co-employee. The court, however, held the contrary, in accordance with *Churchill v. Stephens*, 91 N.J. 195, 102 Atl. 657, that a negligent co-employee is a third party; *Webster v. Stewart*, 210 Mich. 13, 177 N.W. 230: "Some persons other than an employee" includes the vice-president of the corporation; *Behr v. Soth*, 170 Minn. 278, 212 N.W. 461, the chief of a fire department, a third person. See also *Zimmer v. Casey*, 296 Pa. 529, 146 Atl. 130; *Lee v. Dunkerly Bros.*, 103 L.T. N. S. 467 (Eng). A diligent search has revealed no cases of contrary opinion.

The reasoning of all courts on this point is substantially the same. The Legislatures of the respective states above mentioned, and our own have not defined the phrase *third party*, intending it to convey the ordinary meaning. With that in mind and in view of the generally accepted rules as recognized in *Lawton v. Waite*, supra and *Cermak v. Air Power Pump Co.*, supra, it would have been highly inconsistent for the court to allow a co-worker to shield his tortious conduct behind such an antiquated and superficial doctrine as tort immunity for co-employees.

The Workmen's Compensation Act was not enacted for the purpose of absolving tortfeasors from the consequences of their negligent or wrongful acts, but rather to provide a *speedy remedy* to injured employees without necessitating lengthy lawsuit, requiring continued absence from employment. Likewise, employers were not meant to bear the entire burden of this so beneficial legislation without some means of exoneration. Manifestly, then, the courts have decided in conformity with well established rules of justice and right thinking in construing the will of the people of Wisconsin, represented by the enactment of their legislature, as herein recounted.

EUGENE CHRISTMAN